

## Seabed boundary delimitation

- 3.1 In the period between the announcement of the results of the ballot in which the population of East Timor voted for independence and its accession to independence, the media provided an acute reflection of the mixed emotions among the Australian public concerning its near neighbour.
- 3.2 On the one hand, media reports celebrated the role played by the Australian Defence Force and volunteers in assisting East Timor's recovery from the outbreak of violence that followed the ballot result.<sup>1</sup> On the other, the Australian Government was criticised for not acting sooner. These reports recalled the uneasiness felt by many Australians at the acceptance of Indonesia's annexation of East Timor by successive Australian governments.<sup>2</sup>
- 3.3 Continued ill ease at the vulnerability of East Timor was reflected in expressions of concern to the Committee that Australia had failed to treat its northern neighbour fairly in treaty negotiations. In particular, these concerns focused upon the dimensions of the JPDA set out in the Treaty.

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1 P. Cole-Smith, 'World Owes Australia Thanks: US', *Sydney Morning Herald*, 14 January 2000; C. Smith, 'UN Chief Lauds Darwin's Spirit', *Northern Territory News*, 19 February 2000; G. Reid, 'Queen Praises Our Brave Timor Troops', *Mercury*, 30 March 2000.

2 L. Wright, 'Intelligence Leaks Just Part of the Great Political Flux', *The Canberra Times*, 2 January 2002; S. Burchill, 'Apologists are Reviving History to Absolve Jakarta', *Age*, 15 March 2000; A. Ramsey, 'How Gough Whitlam's Words Sealed the Tragedy', *Sydney Morning Herald*, 16 September 2000.

## The JPDA

- 3.4 The Department of Foreign Affairs and Trade (DFAT) acknowledged that the Treaty has been criticised by non-government organisations because of ‘the structure of the JPDA, [that is] where the boundaries exist ...’<sup>3</sup>
- 3.5 The principal document on which criticisms of JPDA boundaries were based is an *Opinion in the Matter of East Timor’s Maritime Boundaries* by Vaughan Lowe, Christopher Carleton and Christopher Ward (the Lowe Opinion). The Lowe Opinion was commissioned by Oceanic Exploration and Petrotimor, an oil and gas company that was granted an exploration concession by the Portuguese Timor administration in 1974.
- 3.6 Oceanic Exploration and Petrotimor are plaintiffs in an action seeking compensation from the Commonwealth Government, the Phillips Group and the Joint Authority in relation to its claim for this concession. The proceedings are presently before the Federal Court of Australia. At the time of writing:
- There have been a number of interlocutory skirmishes ... and no defences have been filed.<sup>4</sup>
- 3.7 Criticisms of the boundaries of the JPDA can be divided between those that refer to the north-south dimensions of the JPDA arguing that Australia and East Timor ought to settle a permanent seabed boundary along a line equidistant from each country’s baseline. In effect these arguments call for the replacement of the JPDA with a permanent maritime boundary.
- 3.8 There has also been criticism of the lateral dimensions, that is, the eastern and western lines, of the JPDA. This position supports the enlargement of the breadth of the JPDA.

## The north-south dimensions of the JPDA

- 3.9 The JPDA has been criticised as being based upon ZOCA provided for by the ‘illegitimate’ Timor Gap Treaty.<sup>5</sup> The Timor Gap Treaty is presented as illegitimate because it arose as the result of the occupation of East Timor by Indonesia, an occupation that was not recognised by the United Nations.

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3 Geoffrey Raby, *Transcript of Evidence*, 12 July 2002, p. 24.

4 Ron Nathans, *Transcript of Evidence*, 8 October 2002, p. 193.

5 For example, Rob Wesley-Smith, *Transcript of Evidence*, 3 October 2002, p. 99, Demetrio Amaral de Carvahlo, *Transcript of Evidence*, 3 October 2002, p. 113, and David Pargeter, *Transcript of Evidence*, 4 October 2002, p.154.

- 3.10 In response to claims that the JPDA is based upon the Timor Gap Treaty the Committee was informed that, in fact, the dimensions of the JPDA (and thus the dimensions of ZOCA) coincide with the concession granted to Oceanic Exploration and its subsidiary Petrotimor in 1974.<sup>6</sup>
- 3.11 The northern boundary of the JPDA is based on Australia's claims to its continental shelf under the principle of natural prolongation enunciated in Article 2 of the 1958 Convention on the Law of the Continental Shelf and reaffirmed in Article 76 of the 1982 UNCLOS. UNCLOS entered into force on 16 November 1994.
- 3.12 The southern boundary of the JPDA is based on a median line between East Timor and Australia. The median distance principle was enunciated in Article 6(1) of the 1958 Convention of the Law of the Continental Shelf and reaffirmed in Article 15 of the 1982 UNCLOS.
- 3.13 The submissions that dispute the legitimacy of the JPDA argue that the northern line should be removed because natural prolongation no longer has currency in international law. They argue that Australia and East Timor should agree to a seabed boundary at the median distance between the two countries as they have opposite or adjacent coastlines that are less than 400 NM apart as per article 15 of the UNCLOS.
- 3.14 Delimitation based on the principle of median distance would move significant hydrocarbon resources that currently fall within the JPDA and Australian jurisdiction to the possession of either East Timor or Indonesia. These resources include the Greater Sunrise, Elang Kakatua and Bayu-Undan oil and gas fields that are partially or entirely within the JPDA as well as the Laminaria and Buffalo oil and gas fields that are currently completely within Australian jurisdiction.
- 3.15 The suggestion that Australia and East Timor should settle their maritime boundary along a line of equidistance not only ignores Australia's continental shelf claim but also East Timor's Exclusive Economic Zone (EEZ) claim that extends 200 NM from its coastline. East Timor claimed an EEZ when its Parliament passed *Lei No. 7/2002, Fronteiras Maritimas do Territorio da Republica Democratica de Timor-Leste* (Maritime Zones Act).

### The lateral dimensions of the JPDA

- 3.16 It has been suggested that points A16 and A17, which lie at the beginning of either side of the Timor Gap, could have been spaced at wider points. Thus it could be argued that:

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6 Chris Ward, *Transcript of Evidence*, 8 October 2002, p. 196.

the narrower gap left by the agreement represented an encroachment by Australia and Indonesia on the area that could be claimed by Portugal.<sup>7</sup>

- 3.17 However, another view has suggested that the convergence of the eastern and western lateral boundaries is:

The result of East Timor being at the head of a convex coastline that consists of the Island of Timor and the Indonesian archipelago to the east.<sup>8</sup>

- 3.18 The Lowe Opinion argues that the eastern and western lateral dimensions of the JPDA are open to challenge under the current principles of international law. The eastern boundary of the JPDA is derived along a line of equidistance between East Timor and Indonesia by giving full effect to Indonesian island of Leti. However, because of the relative size of East Timor to Leti it could be argued that a line giving a less than full effect be drawn.<sup>9</sup>

- 3.19 In responding to the Lowe Opinion, Dean Bialek of the University of Melbourne argued that:

the Lowe opinion ... fails to mention ... that Indonesia is an archipelagic state – meaning that its islands form part of its territory and it can draw base lines around the outermost points of its islands and can treat all the waters within as its own territory. You could say that makes the Indonesian archipelago, including the archipelagic waters, tantamount to a territorial continent ...<sup>10</sup>

- 3.20 Chris Ward of Deacons Lawyers and co-author of the Lowe Opinion challenged the fairness of:

placing a state that has an archipelagic baseline against a state that does not.<sup>11</sup>

- 3.21 Victor Prescott, Emeritus Professor of Geography at the University of Melbourne, explains the disparity by noting that although:

East Timor and Indonesia are both archipelagic states ... only Indonesia is able to draw archipelagic baselines ... [because East Timor's archipelagic lines] ... would not enclose an area of sea

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7 Robert J. King, *Submission No. 43*, p. 5.

8 Victor Prescott, 'East Timor's Possible Boundaries with Indonesia and Australia in the Timor Sea', *Exhibit No. 11*, p. 3.

9 Vaughan Lowe, Christopher Lowe and Christopher Ward, *Opinion in the Matter of East Timor's Maritime Boundaries*, 11 April 2002, paras. 39 and 40.

10 Dean Bialek, *Transcript of Evidence*, 4 October 2002, p. 135.

11 Chris Ward, *Transcript of Evidence*, 8 October 2002, p. 200.

equal to its land territory, that is required by article 47(1) [of the UNCLOS].<sup>12</sup>

- 3.22 The eastern lateral boundary of the JPDA is significant in that it runs across the gas and oil fields of the Greater Sunrise. Giving a less than full effect to the island of Leti, and thus altering this line, would change the proportion of Greater Sunrise that falls under JPDA and Australian jurisdictions.
- 3.23 On the western side of the JPDA the Lowe Opinion challenges the origin of the line arguing that it ought to have been drawn from the thalweg of Moti Masin rather than to the east of this point. This would allow the line to proceed through point A18 rather than point A17 and thus incorporate the oil and gas fields of Laminaria and Corallina.<sup>13</sup>
- 3.24 The Committee notes that Professor Prescott has pointed out that:
- In fact the western boundary south of Point 17 is a line of equidistance between the nearest points on the coasts of East and Indonesian Timor.<sup>14</sup>
- 3.25 The Committee notes, however, that the democratically elected Government of East Timor has judged that the entering into force of the Treaty in its current terms best serves the national interests of its constituents in the circumstances.

## Negotiation or litigation

### A provisional treaty and a permanent delimitation

- 3.26 The Committee heard suggestions that the ratification of the Treaty could compromise the strength of any future claims that East Timor might make in relation to the area under dispute:
- the fact that states accept for interim purposes certain boundary lines has been consistently held in international jurisprudence to be a matter that affects the equities in any subsequent delimitation proceeding and it is not certain that the without prejudice clause

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12 Victor Prescott, 'East Timor's Possible Boundaries with Indonesia and Australia in the Timor Sea', *Exhibit No. 11*, p. 8.

13 Vaughan Lowe, Christopher Lowe and Christopher Ward, *Opinion in the Matter of East Timor's Maritime Boundaries*, 11 April 2002, para. 38.

14 Victor Prescott, 'East Timor's Possible Boundaries with Indonesia and Australia in the Timor Sea', *Exhibit No. 11*, p. 7.

would be sufficient to save East Timor from that fate in any subsequent delimitation proceeding.<sup>15</sup>

- 3.27 Gillian Trigg of the University of Melbourne and Dean Bialek have argued that, in fact:

The Timor Sea Treaty sails as close to recognition of East Timor's sovereignty over the disputed seabed as it is possible to manoeuvre without conceding the point entirely ... Were it not for the [without prejudice] provision, an implication to be drawn from the Timor Sea Treaty is that Australia's claim to the full extent of the continental shelf up to the Timor Trough is seriously prejudiced.<sup>16</sup>

- 3.28 The Committee is aware that Article 2 of the Treaty contains a 'without prejudice' clause and refers explicitly to Article 83 of the UNCLOS which is concerned with the making of provisional arrangements to exploit natural resources in areas that are the subject of disputed claims.<sup>17</sup>

## Australian declarations

- 3.29 Australia has made declarations under Articles 287(1) and 298(1)(a) of the UNCLOS and Article 36(2) of the Statute of the International Court of Justice (ICJ). The declarations exclude Australia from the compulsory jurisdiction of the Convention and the Court in matters of the delimitation of maritime boundaries.
- 3.30 The Committee reported on these treaty actions in *Report 47: Treaties Tabled on 18 and 25 June 2002*.
- 3.31 The Justice and International Mission Unit of the Uniting Church in Australia expressed concern that:

Australia's declarations were motivated to stop the [ICJ] from considering the maritime boundary between Australia and East Timor with implications for the exploitation of the oil and natural gas fields within the Timor Sea.<sup>18</sup>

and suggested that the motivation for the declarations was:

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15 Chris Ward, *Transcript of Evidence*, 8 October 2002, p. 191.

16 Gillian Trigg and Dean Bialek, 'The Timor Sea Treaty and Interim Arrangement for Joint Development of Petroleum Resources of the Timor Gap', *Exhibit No. 10*, p. 12.

17 Dean Bialek, *Transcript of Evidence*, 4 October 2002, pp. 126, 128 and 133 and Pat Brazil, *Submission No. 22*, pp. 1-2.

18 The Justice and International Mission of the Uniting Church in Australia, *Submission No. 34*, p. 1.

that the Australian Government recognises it is able to negotiate from a position of power with regard to ... East Timor.<sup>19</sup>

3.32 Australians for a Free East Timor claimed that:

The Australian government ... seek[s] to prevent East Timor gaining Maritime Boundaries other than the JPDA ... as shown by its withdrawal on 19<sup>th</sup> March [sic] from the jurisdiction of the ICJ in relation to Maritime boundaries for East Timor ...<sup>20</sup>

3.33 DFAT rejected the notion of unequal negotiating positions and said that, in relation to the East Timor negotiating team, it:

consisted primarily of UN funded negotiators – very skilful and able international negotiators – and they still continue to draw on those negotiators...

and further, as to Australia's attitude towards East Timor:

But I think there is a more fundamental point here, and that is that Australia made it possible for East Timor to realise its independence ambitions. We have a very large and expensive military presence in East Timor to underpin that act of independence. We are, if not the largest, one of the largest aid donors to East Timor.<sup>21</sup>

3.34 The Department of the Attorney-General stated that the declarations apply to all of Australia's maritime boundaries, not just those with East Timor, and that 'East Timor has said it is keen on negotiation as a means of resolving these disputes.'<sup>22</sup> The Department drew the Committee's attention to some 'very odd results' that have arisen in instances of third party arbitration:

The case I am thinking of is a boundary that was set by arbitration between Canada and France in relation to some French possessions very close to the coastline of Canada. These islands ended up with an exclusive economic zone which was 200 nautical miles long and 10½ nautical miles wide.<sup>23</sup>

3.35 In response to suggestions that the declaration under the ICJ was intended to deprive East Timor of the opportunity to seek the Court's ruling on its maritime boundary with Australia, the Attorney-General's Department pointed out that East Timor was not yet a member of the United Nations

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19 The Justice and International Mission of the Uniting Church in Australia, *Submission No. 34*, p. 1.

20 Australians for a Free East Timor, *Submission No. 6*, p. 1.

21 Geoffrey Raby, *Transcript of Evidence*, 8 October 2002, p.235.

22 William Campbell, *Transcript of Evidence*, 12 July 2002, pp. 50-1.

23 William Campbell, *Transcript of Evidence*, 12 July 2002, p. 51.

and so, in the Department's view, does not have status to refer a matter to the ICJ.<sup>24</sup>

3.36 Gillian Trigg and Dean Bialek have argued that:

The unique geographical, geological, historical, political and economic characteristic of each disputed boundary preclude the formulation of hard and fast rules for delimitation.<sup>25</sup>

3.37 The Committee explored the possible outcomes of a litigated settlement with some witnesses. One scenario that emerged was that one of the parties could win complete jurisdiction of the disputed JPDA. It was put to witnesses that, in this event, although Australia might be able to wear the impact of such a loss, East Timor's precarious economic condition would make it an all or nothing gamble for that country.

3.38 In response to this suggestion Mark Zirnsak, representing the Uniting Church, agreed:

there is the possibility that East Timor could come off financially worse if international arbitration were to result in a maritime boundary along the Timor Trough ... a negotiated settlement is obviously preferable ...<sup>26</sup>

This is because a negotiated settlement would allow the parties to consider a wide range of factors in graduated terms rather than in the black and white terms of international law to which a court or arbitral tribunal would be constrained. This wider range of factors includes:

how such a fledgling nation can develop infrastructure and an economic basis for survival and development.<sup>27</sup>

## Conclusions

3.39 The terms of the Treaty touch upon issues of delimitation in so far as they provide for the dimensions of a JPDA in which petroleum activities can be conducted. The Committee is of the view that the 'without prejudice' clause taken together with the explicit acknowledgment of Article 83 of the UNCLOS in Article 2 of the Treaty provides for the agreement of both parties that the terms of the Treaty are provisional.

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24 William Campbell, *Transcript of Evidence*, 12 July 2002, p. 51.

25 Gillian Trigg and Dean Bialek, 'The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap', *Exhibit No. 10*, p. 19.

26 Mark Zirnsak, *Transcript of Evidence*, 4 October 2002, p. 161.

27 David Pargeter, *Transcript of Evidence*, 4 October 2002, p. 160.



- 3.40 A considerable body of evidence, in the form of oral and written submissions, was received regarding the various principles and possibilities that might be considered in settling the maritime boundary between Australia and East Timor. However, it is not within the purview of the Committee's inquiry into the Treaty to prejudge the possible outcomes of negotiation or litigation on the matter of a permanent maritime delimitation.